Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

ANGEL YOY,

Plaintiff,

-against-

ORIENT-EXPRESS HOTELS, INC., et al.,

Defendants.

Index No. 28510/11

Motion Date September 4, 2012

Motion Cal. No. 51

Motion Sequence No. 1

	Papers Numbered
Notice of Motion-Affidavits-Exhibits...	1-6

Upon the foregoing papers it is ordered that this motion by defendant, Orient-Express Hotels, Inc. ("OEHI") pursuant to CPLR 3211(a) dismissing the Complaint of plaintiff, Angel Yoy prior to submission of an Answer is hereby denied.

Plaintiff, Angel Yoy commenced this action seeking inter alia, to recover for serious personal injuries he sustained on August 17, 2011 at the premises located at 17 West 52nd Street, New York, New York 10019, which premises were allegedly owned, operated, maintained, managed, and controlled by moving defendant, OEHI. Plaintiff alleges the injuries were sustained during the course of his employment with a restaurant known as the "'21'" Club" when he was struck by falling ceiling material and debris at the premises. Plaintiff brings causes of action against moving defendant sounding in negligence and violations of Labor Law § 200, Labor Law § 240(1), and Labor Law § 241(6). Defendant OEHI now moves to dismiss the complaint.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (Leon v. Martinez, 84 NY2d 83 [1994]). In determining whether plaintiff's complaint states a valid cause of action, the court must accept each allegation as true, without expressing any opinion on plaintiff's ultimate ability to establish the truth of these allegations

before the trier of fact (219 Broadway Corp. v. Alexanders, Inc., 46 NY2d 506 [1979]; Tougher Industries, Inc. v. Northern Westchester Joint Water Works, 304 AD2d 822 [2d Dept 2003]). The court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (see, CPLR 3211[a][7]; Hoag v. Chancellor, Inc., 246 AD2d 224 [1st Dept 1998]).

A. CPLR 3211(a)(1)

That branch of defendant OEHI's motion to dismiss plaintiff's causes of action pursuant to CPLR 3211(a)(1) is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***." In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***." (Fernandez v. Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702; Vanderminden v. Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v. Webster Town Center Partnership, 221 AD2d 248).

The documentary evidence submitted in support of this branch of the motion consists of: an affidavit of Bryan McGuire, the General Manager of '21' Club since 1994; an affidavit of David C. Williams, the Vice President--Sales & Marketing of OEHI since 2004; a copy of the Deed to 21 West 52nd Street, New York, New York; and an Abbreviated Form of Agreement between Owner and Contractor, with the Owner being designated as 21 Club, Inc. and the Contractor being designated as Synergy Construction Inc.

Affidavits are not considered "documentary evidence" within the intended scope of CPLR 3211(a) (Suchmacher v. Manana Grocery, 73 AD3d 1017 [2d Dept 2010][internal citations omitted]; see, Fontanetta v. John Doe 1, 73 AD3d 78 [2d Dept 2010]). The remaining documentary evidence is insufficient to dispose of the causes of action, as factual issues remain. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (Held v. Kaufman, 91 NY2d 425 [1998]; Teitler v. Max J. Pollack & Sons, 288 AD2d 302 [2001]). In the instant case, factual issues remain as to inter alia, whether moving defendant exercises operational control over the subject premises.

B. CPLR 3211(a)(7)

That branch of defendant OEHI's motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against OEHI for failure to state a cause of action is decided as follows:

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference." (Jacobs v. Macy's East, Inc., 262 AD2d 607, 608 [2d Dept 1999] [internal citations omitted]; Leon v. Martinez , 84 NY2d 83) and a determination by the Court as to whether the facts alleged fit within any cognizable legal theory (1455 Washington Ave. Assocs. v. Rose & Kiernan, Inc., 260 AD2d 770 [3d Dept 1999]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v. State of New York, 42 NY2d 272 [1977]; Jacobs v. Macy's East, Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, Rovello v. Orofino Realty Co., Inc., 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (Given v. County of Suffolk, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, Rovello v. Orofino Realty Co., Inc., supra; Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 AD2d 159). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint." (Jericho Group, Ltd. v. Midtown Development, L.P., 32 AD3d 294 [1st Dept 2006][internal citations omitted]).

The first, second, and third causes of action sound in Negligence. A Claim for Negligence has been stated via paragraphs 47-83 of the Verified Complaint.

To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of their injuries (see, Gordon v. Muchnick, 180 AD2d 715 [2d Dept 1992]). However, absent a duty of care, there is no breach and no liability (Id.; see also, Marasco v. C.D.R. Electronics Security & Surveillance Systems Co., et.al., 1 AD3d 578 [2d Dept 2003]).

A Claim for the Fourth Cause of Action seeking relief pursuant to Labor Law § 200 has been stated via paragraphs 84-102 of the Verified Complaint.

It is well settled that liability for negligence will attach pursuant to common law or under Labor Law § 200 if the plaintiff's injuries were sustained as a result of a dangerous condition at the work site and only if the owner, contractor or agent exercised supervision and control over the work performed at the site or had actual or constructive notice of the alleged dangerous condition (see, Pirotta v. EklecCo., 292 AD2d 362 [2002]; Kobeszko v. Lyden Realty Investors, 289 AD2d 535 [2001]; Giambalvo v. Chemical Bank, 260 AD2d 432 [1999]). Labor Law § 200 codifies the common law duty of owners and general contractors to provide construction site workers with a safe working environment (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]). In order for a defendant to be liable under this section, "the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition." (Damiani v. Federated Department Stores, Inc., 23 AD3d 329 [2d Dept 2005][internal citations omitted]). Liability is dependent upon the amount of control or supervision exercised over the plaintiff's work (Id.).

A Claim for the Fifth Cause of Action seeking relief pursuant to Labor Law § 240(1) has been stated via paragraphs 103-107 of the Verified Complaint.

Labor Law § 240 (1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]; see, Rocovich v. Consolidated Edison Co., 78 NY2d 509, 514 [1991]; Gasques v. State of New York, 59 AD3d 666 [2009]; Rau v. Bagels N Brunch, Inc., 57 AD3d 866 [2008]). The duty to provide scaffolding, ladders, and similar safety devices is non-delegable, as the purpose of the section is to protect workers by placing the ultimate responsibility on the owners and contractors (see, Gordon v. Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Ortega v. Puccia, 57 AD3d 54 [2008]; Riccio v. NHT Owners, LLC, 51 AD3d 897 [2008]). In order to prevail on a cause of action pursuant to Labor Law § 240 (1), the plaintiff must establish that the statute was violated and that said violation was the proximate cause of his or her injuries (see, Chlebowski v. Esber, 58 AD3d 662 [2009]; Rakowicz v. Fashion Inst. of Tech., 56 AD3d 747 [2008]; Rudnik v.

Brogor Realty Corp., 45 AD3d 828 [2007]).

A Claim for the Sixth Cause of Action seeking relief pursuant to Labor Law § 241(6) has been stated via paragraphs 108-112 of the Verified Complaint.

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide necessary equipment to maintain a safe working environment, provided there is a specific statutory violation causing plaintiff's injury (see, Toefer v. Long Island R.R., 4 NY3d 399 [NY 2005]; Bland v. Manocherian, 66 NY2d 452 [1985]; Kollmer v. Slater Electric, Inc.,122 AD2d 117 [2d Dept 1986]). The Court of Appeals has held that the standard of liability under this section requires that the regulation alleged to have been breached be a "specific positive command" rather than a "reiteration of common law standards which would merely incorporate into the State Industrial Code a general duty of care." (Rizzuto v. LA Wenger Contracting, 91 NY2d 343 [NY 1998]). In order to support a Labor Law § 241(6) cause of action, such a regulation cannot merely establish only "general safety standards", but rather must establish "concrete specifications." (see, Mancini v. Pedra Construction, 293 AD2d 453 [2d Dept 2002]; Williams v. Whitehaven Memorial Park, 227 AD2d 923 [4th Dept 1996]).

Moving defendant has improperly sought to reach the merits of the complaint on this mere CPLR 3211(a)(7) motion (see, Stukuls v. State of New York, supra; Jacobs v. Macy's East Inc., supra).

Accordingly, as moving defendant has failed to satisfy its burden as the proponent of a motion for summary dismissal, moving defendant's motion is denied in its entirety.

Defendants may serve an Answer within twenty (20) days of service of a copy of this order with Notice of Entry.

The foregoing constitutes the decision and order of this Court.

Dated: September 18, 2012

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Howard G. Lane, J.S.C.